SOME NEEDED REFORMS IN THE METHODS OF SELECTING JURIES.

FOR the purpose of comparison and in a measure as a justification for some of the conclusions reached, I will premise what I have to say by a general review of the practice of securing juries in England.

Under the English practice but two inquiries are permitted to be asked the juror in a criminal case: (1) Whether he is in any way related to the accused or his victim, and (2) whether he knows of any reason why he cannot render a verdict in accordance with the evidence presented to the court. The protracted and rambling interrogatories, which have come to be a regular feature of nearly every important trial in this country, are not permitted. Anything beyond the two inquiries indicated, to an Englishman, seems superfluous and a waste of time. The result is that rarely more than an hour is required by an English court in completing a panel in the most difficult case.

Mr. R. Newton CRANE, formerly a member of the American bar, but for some time past a prominent barrister of London, says: "The examination of jurors on their voir dire is absolutely unknown in England; while many lawyers who have been in practice for twenty years or more have never known a juror to be objected to or excused for cause. It not infrequently happens that the same twelve jurymen will hear three cases without leaving the box."[1]

The correctness of this statement is confirmed by Mr. John D. LAWSON, dean of the Law Department of the University of Missouri, in a notable address delivered before the American Institute of Criminal Law and Criminology.[2] At the organization of this institute in Chicago in June, 1909, among other important steps taken was the passage of a resolution for the appointment of a committee of five members whose duty, among other things, was "to inquire into the systems of criminal law and procedure in other countries, particularly Great Britain, with a view to ascertaining in what respect, if any, they are superior to that of the United States, and report whether, in its opinion, the methods which have been adopted abroad for meeting certain of the evils that have developed in American procedure are suitable for adoption in the United States."

Pursuant to this resolution the committee was appointed with Mr.

[1] Report of New York Commission on "The Law's Delay" p. 111.
[2] 1 Journal of Criminal Law and Criminology, pp. 595 and 748.

LAWSON as one of its members. The investigations were made, and the result reported at the next annual meeting of the Institute.

Mr. Lawson declared that it required no longer to select a jury in England than is necessary to call their names, and that the challenge of a juror is as rare as the challenge of a judge in this country. He says that during the four months he spent in the English courts, he never saw a juror challenged, and that he was informed by one of the judges that only one instance of a challenge had come under his observation during a period of fourteen years.

It is not allowable, he says, to ask a prospective juror whether he has formed or expressed an opinion, for it is not assumed that one who has expressed an opinion on the facts as heard from others or read in the newspapers is thereby biased. The burden of proof of showing prejudice is upon him who challenges the juror, and evidence of bias must be produced to support a challenge. Neither counsel for the Crown nor the defense is permitted to go on a fishing expedition in the course of the examination in the hope of finding bias.

The report of the committee is both interesting and instructive. Among other things not already alluded to, it says that the members of the jury are selected from a list of qualified persons furnished the clerk of the county by the church wardens and overseers of the poor in the several townships and parishes, and that the men so selected constitute a more permanent and substantial body than is the case in this country; that in challenging a juror for cause counsel must state the ground of the alleged bias and produce proof aliunde in support of his charge, two of the jurors themselves acting as triers of the fact.

"One reason," the report continues, "which plays a great part in the confidence of court and counsel in the fairness of the men called as jurors, is the influence of the courts upon the press and the authority which they exercise in preventing the newspapers from prejudicing a pending case. From the day the prosecution is begun until the jury renders a verdict, a newspaper is not permitted to comment upon the evidence or express opinions upon the guilt or innocence of the prisoner. Anything beyond a fair report of the evidence, as it is given in the magistrates' or the trial court, is a contempt of court which is severely dealt with by the judicial tribunal."

The address of Mr. LAWSON and the report of this committee are, it seems to me, pregnant with suggestion as to needed reforms in our own practice. It is no doubt true that under our present long established methods it would be neither practical nor expedient to at-

tempt at once to follow England's practice to its full length. In some respects the methods pursued there would be wholly impossible here on account of the existing differences in our social conditions, the authority of our courts and the general theories of our practice. In so far, however, as they can be applied, I see no reason why we should not profit by them whenever possible, for I am convinced that our own methods, taken all together, suffer considerably when compared with the English practice. I venture, therefore, the following remedial suggestions, with a brief summary of the reasoning on which they are based:

1. *The securing of the jury should be under the guidance and control of the trial judge, and his judgment and rulings should be final and conclusive, except in case of a clear abuse of discretion affecting the merits of the controversy.*

So long as present appellate methods of assuming prejudice from error obtain, it would be a rash undertaking on the part of a trial judge, especially in the absence of objection by opposing counsel, to interfere voluntarily with such examination; and objections are not made as often as they should be on such examinations. The delicacy of the situation restrains the attorneys from assuming antagonistic methods.

When it is considered that nearly fifty per cent of the cases taken to the appellate courts of the various states on appeal are reversed, we can understand this hesitancy on the part of the trial judges to take any chances for reversal by exercising that freedom and independence of judgment that ought, by law, to be accorded to them.

I believe that trial judges generally are men of at least average intelligence, learning and probity. The effect of applying the rule of assuming prejudice from error results in establishing a record against them, which shows on its face that they correctly interpret the law in only about one-half of the cases appealed from their courts. Either the trial judges are woefully incompetent, or the methods applied in reversing cases are radically wrong. I am inclined to the belief that the latter is the case. The reversal of so large a proportion of appealed cases results, I believe, in the multiplication of cases taken to the appellate courts, and many times in the prolongation of trials by the interposition of objections wholly without excuse, so far as the just merits of the controversy are concerned, but which are interposed in the hope that reversible error may in some way be gotten into the record.

Mr. LAWSON, in the address already referred to, in comparing the efficiency of the English and American trial judges, says that, "Judges of the English courts are men of the highest type and are

well paid. Jurists holding positions similar to those of our circuit judge receive a salary of from $12,000 to $15,000 a year, while the members of municipal courts that deal with minor criminal matters receive a salary of about $7,500. Positions on the bench in England give social prestige, and they are prized by some of the best legal minds in the country."

The learned and astute editor of "Law Notes" comments editorially upon these remarks as follows:

"It cannot be doubted that in these facts lies in large measure the reason for the great efficiency of the judicial administration of the law in England. In this country, the position of circuit judge is not regarded with half the respect that attaches to the judge of an insignificant municipal court in England, and it is correspondingly less sought by that type of men which is found on the English circuits. With few exceptions, political influence is a strong factor in the claims of the average circuit judge to his position in this country. In providing for his remuneration and for the maintenance of his court, the legislature acts upon the distinct assumption that he is not a personage of very great importance. He is made to feel by every influence which both the bar and general public, as well as the members of the appellate tribunals, can bring to bear, that his every word and action is subject to the superior judgment of the latter. In considering his appointment, no regard has been paid to the fact that in the exigencies of his daily work he requires a larger knowledge of law and a keener and quicker perception of legal problems than are required by his more respected and more carefully selected brethren of the appellate courts, and he is constantly made to feel that his position is that of an inferior."[3]

The truth of the matter seems to be, with reference to securing juries, that in our over zealous care to protect the possible rights of those accused of crime, and parties litigant generally, we have reached the extreme limit of liberality, resulting altogether too frequently in an enormous waste of time, in a vast and unnecessary expenditure of money, in frequent defeats of justice, and, more important and damaging than all the rest, in bringing into general disrepute our entire judicial system by reason of these very delays, large expenditures and quibbles.

2. *The examination of a proposed juror should be confined to the essential questions relating to his qualifications, namely, as to whether he is related to either of the parties, and as to whether he can return a fair and impartial verdict on the evidence.*

[3] 14 Law Notes, p. 143.

In one recent trial in Chicago three weeks were consumed and 800 veniremen summoned in the selection of the jury. In two other Chicago trials, nine and one-half weeks in one and thirteen and one-half weeks in the other, were required to complete a panel. In the former case over 4,000 veniremen were summoned and 4,000,000 words used in conducting their examination; the cost in fees to veniremen and jurors, including hotel expense, was $6,000. In the latter more than 9,000 veniremen were summoned, of whom nearly 5,000 were actually examined; the cost in jury fees alone aggregated $13,000. In San Francisco ninety-one days were consumed in the selection of a jury in the Calhoun bribery case, and in the Cooper case in Tennessee several weeks were similarly consumed.

Of course these are exceptional cases, but there is scarcely a case of state-wide or national importance or interest but that an unusually great length of time is consumed and an unusually large expense is incurred in what, it seems to me, should be the mere formal act of selecting a jury to try the cause. And it is through these cases of general interest, the proceedings of which are so widely heralded, that the general public obtains its ideas and even its knowledge of the laws and methods pursued in our courts in administering justice. The thousands of cases in which reason and moderation dominate are unnoticed and unknown except by the very few interested parties. These delays, which are not only made possible but actually occur with increasing frequency under our present system, would seem to indicate that reform in this particular is needed.

Aside from the waste of time and expense, such delays tend to increase the aversion to jury duty on the part of our business and professional men, thus rendering the task of selection more difficult. Two reasons may be assigned for this aversion: (1) In capital cases the jury may be kept together under the care of an officer of the court, virtual prisoners during the progress of the trial. A business or professional man, confronted with the prospect of being kept away from his home and his business for weeks, a prisoner at the hands of the court before the trial actually begins, is likely to find some excuse for his release. If there is any doubt in his own mind as to whether or not he can render an impartial verdict, he is very likely to resolve that doubt in favor of his own comfort and liberty by professing a prejudice which does not really exist. (2) The irrelevant and long drawn out interrogatories often asked the proposed juror—questions relating to his past life, his business, his domestic and social relationships—are distasteful to the average citizen, and many avoid such an inquisition if possible so to do. In one of the Chi-

cago cases referred to, one juror was subjected to one and three-fourths hours of such irrelevant inquiry. In the Iroquois theatre fire case jurors were asked whether they were opposed to dancing, whether they were fond of music, whether they believed in theatre-going, whether they had any prejudice against theatre-going, whether any of their families were ever hurt in a fire, and many other questions of similar character.

In securing the jury in a recent trial for rape in Kent Circuit Court (Michigan), thirty-six members of the original panel and thirty-four additional veniremen were required before counsel announced themselves as satisfied. The challenges, both peremptory and for cause, were exercised wholly in behalf of the respondent, the full statutory allowance of thirty peremptory challenges being used. Two full days were occupied in securing this jury. The taking of the testimony, the arguments of counsel, the charge of the court, the consideration of the jury, and the verdict required but a trifle over a day. The securing of this jury began contemporaneously with the securing of the jury in the now famous Crippen murder case in England. According to newspaper reports, the jury in that case was secured in a little over an hour, and only two peremptory challenges were exercised by the defense. Indeed, that trial was well under way and nearing completion before the jury in the rape case was secured.

I mention this local case as a typical illustration of the abuse made possible by the privileges accorded persons accused of crime under our present practice. In many civil cases, particularly negligence cases, and in cases of more or less public interest, the abuse of these privileges is often no less apparent. In such cases, however, the number of peremptory challenges is largely reduced and the mischief less glaring. Nevertheless, the present methods often lead counsel to almost interminable lengths and to the propounding of questions which require the learning of astute lawyers to answer or sometimes even to understand. Questions intending to test the juror's bias and relating to his understanding of the weight of the evidence, the burden of proof, the presumption of innocence, and the like, are asked again and again of men unlearned in law, common every-day men, coming from the common walks of life, yet honest and with average intelligence and with an earnest desire to do their duty. That their answers are not always in harmony with the strict rules of law is not at all surprising. Yet on these answers counsel seek to base either a challenge for cause or to prepare the way for a peremptory challenge.

3. *The fact that a juror has casually formed or expressed an opinion which will require evidence to remove, ought not, prima facie, to be held a disqualification.*

One of the chief causes of delay in impaneling juries in this country is the assumption that one who, from reading newspaper reports or hearsay evidence, has formed an opinion as to the guilt or innocence of the accused is incapable of rendering a fair and impartial verdict on the basis of the evidence brought out during the progress of the trial. Is this assumption as well founded in fact as it is in law? Necessarily, if such a hasty opinion has been formed, it will require some evidence to remove it, and this is a well recognized ground of challenge for cause. Is not such a rule a reflection upon the intelligence of our best citizens who almost universally read the newspapers and discuss matters of public interest more or less among their friends and acquaintances, and who unconsciously and from necessity, if they are indeed intelligent, form opinions in relation to the matters thus discussed, especially if it be a matter or a case that attracts general and widespread attention in the community?

It seems to me that there is ample room for some modification of this rule which will bring it within reason.

The lay criticisms of our jury system will be found always to include this glaring inconsistency and impeachment of the jurors' intelligence. I am inclined to agree with the layman in this criticism.

One of the fundamental principles of our jury system is that juries have the ability to decide a controverted fact disclosed by the evidence in the case. Any juror capable of weighing the evidence and determining these controverted facts has, I submit, sufficient intelligence and mental balance to alter his preconceived notions of the merits of the case in the light of the evidence produced in open court when that evidence points clearly to a different conclusion. The fact, therefore, that a juror has formed an opinion from reading newspaper reports or from hearsay statements ought not, in my judgment, to be the basis of a challenge for cause, unless the juror also states that he will adhere to that opinion notwithstanding the evidence in the case and the instructions of the court as to the law.

4. *The best known methods of securing jury lists should be adopted so as to insure, as far as possible, the selection of the best material obtainable for jury service, and the elimination from that service of the so-called professional talesman.*

Under the general law of Michigan, the jury lists are sent to the county clerk by the supervisors of the several townships, and this is the practice in nearly every county. From these lists a requisite

number is chosen by the proper officers to serve as jurors for each succeeding term of court. If a greater number is needed, talesmen are usually selected by the officer from the bystanders at the time of the trial to fill the panel. In Kent and Wayne counties, and perhaps in others, a different method has been adopted by special acts of the legislature, known as the commission system. The Act relating to Kent County was passed in 1903. By it the five jury commissioners, who are appointed by the Governor on the recommendation of the judges, divide the county into five districts, each commissioner taking a district, from which he is required to select a sufficient number of good substantial citizens who he believes will make good jurors. At a joint meeting of the five commissioners these lists are compared and sifted and a final list made out and left in the hands of the county clerk. Before each term of court the commissioners, with the assistance of the county clerk, the sheriff and one of the circuit judges, draw the requisite number of names from the jury box of those who are to serve as jurors for the ensuing term, each township in the county and each ward in the city being equitably represented in the names so drawn.

On the assembling of these proposed jurors in the court room on the first day of the term, the court is required to examine each juror separately as to his physical and other qualifications, and find as a fact that he is a suitable person to serve as a juror, which finding is made a matter of record. No person who has served on a jury in a court of record within the past year can possibly be accepted, thus doing away with the professional talesman.

The law further provides sufficient safeguards to prevent disclosure by either the commissioners or the county clerk of any name on the jury lists until it is drawn from the jury box, and makes it a misdemeanor to solicit jury service.

I believe that the commission system is far superior to the older method. By the processes of elimination indicated, it is rare indeed that a person unfit for jury service is selected. The result is that the business of the court is expedited, that juries seldom disagree, and that as a rule fair and intelligent verdicts are rendered. This method should be adopted as a general system throughout the state. There are opportunities for its abuse by the unscrupulous and dishonest commissioner, as was recently witnessed in Chicago, where a similar system obtains; but on the whole it is a long step in advance.

5. *The number of peremptory challenges should be materially reduced.*

In the rape case to which I have referred thirty men were peremptorily challenged, notwithstanding the fact that they had each withstood the most searching examination and answered every question satisfactorily, thereby showing themselves perfectly competent in every respect to try the cause fairly, impartially and intelligently.

But the point with the defense was not to obtain a competent and fair-minded jury, but, on the contrary, to obtain, if possible, men who, from their general appearance, their age, their answers or otherwise, might indicate that they would not consider seriously so grave a charge as rape, and who might be induced to disagree upon a verdict or bring in one of acquittal, notwithstanding the positive evidence of guilt that might appear in the case.

And this is a fair illustration of the general purpose to be subserved in exercising so many peremptory challenges, not from a theoretical, but from a practical standpoint. Has such a purpose as good a foundation in good morals and good judgment as in law?

6. *Adequate provision should be made for the comfort and accommodation of the jurors while engaged in the performance of their duty.*

Another reason for the aversion of many of our best citizens to the performance of jury duty is the treatment they are likely to receive during service. It has always seemed to me an inhuman practice to lock the jury in the jury room over night while considering a case submitted to them. The accommodations of the average jury room are wholly inadequate for that purpose. The suffering and hardships endured by many jurors, particularly those advanced in years, who are compelled to remain with their fellow jurors all night in a small, ill-ventilated, meagerly appointed and often poorly heated jury room, are sometimes almost unendurable, resulting frequently in sickness and all its evil consequences.

I am inclined to think that such a practice is the result of the mistaken assumption that jurors are not personages of very great importance after all, and should be held down with a firm hand, in order to compel them to perform their duty. In my judgment, there is no necessity for the continuance of such a practice. Jurors should not be herded together like cattle while performing the highest and most important duty imposed upon them by the law.

A different practice has been adopted in some trial courts. After a jury is sent out to consider a case, and when it appears by 10:30 or 11 o'clock in the evening that they are not likely to agree upon a verdict, they are taken by the officer or officers in charge to some hotel where suitable arrangements have been previously made for their accommodation. In the morning, physically and mentally re-

freshed, they are returned to their jury room, where they continue their work. I do not know of any law authorizing such a practice, but as yet no objection has been made to it, all parties concerned seeming to accept it as the reasonable and proper thing to do.

To summarize, I believe that the selection of juries could be materially expedited, without impairing the value of our present jury system, by making the decision of the trial judge final upon objections to the questions asked of prospective jurors by either counsel, except in cases of a clear abuse of discretion; by confining the examination to the simple inquiries as to whether the juror is related to either of the parties, and whether he knows of any reason why he cannot return a verdict in accordance with the evidence introduced and admitted; by abolishing the rule which practically disqualifies a juror who has formed or casually expressed an opinion on the question at issue, unless that opinion is founded on manifest prejudice or is so strongly fixed that there is no reason to believe that it would be changed by the evidence; by materially reducing the number of peremptory challenges now usually allowed; by providing more adequate and homelike accommodations for the comfort of jurors, thereby lessening the tendency to shirk jury duty, and by removing some of the petty and unreasonable restrictions on their liberty, particularly those which are inconsistent with the idea that jury service is a dignified and honorable public duty.

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